**IN THE MATTER OF ARBITRATION BETWEEN**

**The U.S. Department of Housing and Urban Development**
**And**
**The American Federation of Government Employees**
**National Council of HUD Locals 222, AFL-CIO**

**Before Arbitrator Sean J. Rogers**

**HUD/AFGE FLSA Overtime Grievance**

Agency Opposition to Union's Renewed Motion for Partial Summary Judgment Relating to Liability for Certain GS-11, 12, 13 and 14 Positions and Union's Motion for Summary Judgment on Certain Damages for all GS-10s and Below and for Certain GS-11, 12, 13 and 14 Positions

The agency requests that the union's Motions for Summary Judgment in this matter be denied in their entirety. In support of its request, the Agency submits the following:

## Standard For Summary Judgment

Summary judgment is appropriate when there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. A fact is material if it might significantly affect the outcome of the suit under governing law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247,248 (1986).

The party moving for summary judgment bears the burden of demonstrating the absence of any genuine issues of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). Once the moving party has met its burden, the non-moving party must set forth evidence of specific facts showing the existence of a genuine issue for trial. *Anderson, 477 U.S.* at 242, 248-250. Only facts that may affect the outcome of the case under governing law are "material" *Anderson* 477 U.S. at 248.

The Arbitrator must resolve any doubts about factual issues in favor of the party opposing summary judgment. All favorable inference must be drawn in favor of the party opposing summary judgment. At the summary judgment stage, the arbitrator's function is not to weigh the evidence and render a determination as to the truth of the matter, but only to determine whether there exists a genuine factual dispute. *Anderson*, 477 U.S. at 248.

**Union's Renewed Motion for Partial Summary Judgment Relating to Liability for Certain GS-11, 12, 13 and 14 Positions**

The union's motion attempts to put a square peg into a round hole. The facts in this matter simply do not fit into the analytical framework of summary judgment. In this regard, it must be noted that the concept of summary judgment presupposes the existence of a completed record. There is no such completed record here.

In its motion at page 3 the union states "In this case the Agency has carried out a 'HUD FLSA Evaluation' in which it has had classification experts evaluate each HUD employee PD and make a decision as to whether HUD now considers the position, and all incumbent employees in the position to be FLSA exempt or FLSA non-exempt."[1] The union then proceeds to assert that the FLSA evaluations are admissions by the agency of FLSA status, and, therefore, there are no factual disputes and the union is entitled to summary judgment.

The flaw in the union's argument is readily apparent. Summary judgment rests on the absence of issues of material fact in the record. As noted above, *Anderson* holds that a fact is material if it might significantly affect the outcome of a case. In this case, significant material facts are absent from the record. Thus, the record is incomplete and it is impossible to conclude that there are no genuine issues of material fact. Specifically, the missing material facts are the duties performed by the employees in question.

An underlying principle governing FLSA exemptions is that the designation of an employee as FLSA exempt or nonexempt ultimately rests on the duties actually performed by the employee *5 CFR 551.202(i).* The Federal Circuit held that position descriptions cannot be relied upon to make FLSA exempt status determinations. *Berg v. Newman*, 982 F.2d 500, 503 (Fed. Cir. 1999), *Ale v. Tennessee Valley Authority, upheld on appeal*, 269 F. 3d 680 (6th Cir. 2001).[2]

The foregoing establishes clearly that the fact pattern in this case cannot support a summary judgment in favor of the union. Such a conclusion would be contrary to law. The record is incomplete. The union's motion is premature and must be denied.

**Union's Motion for Summary Judgment on Certain Damages for all GS-10s and below and for Certain GS-11, 12, 13 and 14 Positions**

The union does not even attempt to place this motion within the summary judgment analytical framework. Rather, it merely refers to the Parties' Partial Settlement Agreement by which it was agreed that positions at the GS-10 level and below would be

[1] The agency does not dispute the fact that the FLSA evaluations in question were purely paper reviews.

[2] This is case law relied upon by the union itself in its November 13, 2005 Motion for Summary Judgment.

classified as FLSA nonexempt.[3] It then attempts to establish an analogy between the GS-10 and below positions and the GS-11, 12, 13 and 14 positions at issue herein, and asserts that damages are due the GS-11-14 positions on the same grounds as they are due the GS10s and below.

Again, the union's reasoning is flawed. It ignores the fact that the GS-10s and below are the subject of a settlement agreement while the GS-11-14 positions are not[4]. Thus, the agency is not precluded from revisiting the FLSA determinations of the GS-11-14 positions herein. A consideration of duties actually performed, either through further management review or an arbitration hearing, may result in FLSA exempt determinations[5]. Accordingly, the union's attempted analogy has failed.

The facts, then, demonstrate that the union has failed to meet any of the established criteria for summary judgment. Accordingly, its motion must be denied.

## Conclusion

A thorough examination of the circumstances of this case can lead to only one conclusion. The union wants to have things both ways. Namely, it wants paper FLSA reviews to be defective if the result is "exempt". It wants paper FLSA reviews to be binding on the agency if the result is "nonexempt". These contradictory concepts cannot coexist. Law dictates that FLSA rests on the duties actually performed by the employee. Absent the evaluation of duties performed, summary judgment regarding FLSA status cannot be obtained.

In light of the foregoing facts, the agency requests that the arbitrator deny the instant motions for summary judgment in their entirety.

Respectfully submitted,

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Norman Mesewicz
Agency Representative

## Certificate of Service

I certify that a copy of the foregoing was served upon the union via Email. March 24, 2006. _____

[3] There is no dispute over damages entitlement for the GS-10s and below. The hearing is scheduled for June 2006.

[4] The settlement agreement is its own authority for the FLSA status of the GS-10s and below. It is separate from established FLSA exemption criteria. There is no reference in the settlement agreement to "wrongful misclassification".

[5] In early March the agency revisited the FLSA status of the GS-950-12 Paralegal Specialist positions and reversed an initial finding of FLSA exempt.